

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>RICHARD AND GENEVA HELM AND TIM AND VICKI MCCART,</p> <p style="text-align: center;">Complainants,</p> <p style="text-align: center;">v.</p> <p>U S WEST COMMUNICATIONS, INC.,</p> <p style="text-align: center;">Respondent.</p>	<p>DOCKET NO. FCU-99-6 (C-98-272) (C-99-386)</p>
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FINAL DECISION AND ORDER

(Issued February 24, 2000)

PROCEDURAL HISTORY

A. C-98-272, Helm v. U S West

On November 30, 1998, Richard and Geneva Helm filed a complaint with the Utilities Board (Board) regarding a delay in installation of service at their new house in Van Meter, Iowa. The complaint was identified as C-98-272. Complainants alleged that when they placed an order with U S West for service at their new home, the Helms requested that service be available in July of 1998. However, service was not installed on that date, as the order became a "held order" due to lack of facilities.

On December 22, 1998, the Helms updated their complaint to inform the Board that U S West was requesting \$5,434.93 from the Helms and their neighbors,

the McCartys, to cover the cost of laying 3,441 feet of cable to provide telephone service to their new houses.

U S West responded on January 15, 1999, explaining that pursuant to its Iowa Tariff No. 1, Section 4.5.A, when the company extends its facilities to furnish telephone service where no service is available, the company will provide an allowance of one-half route-mile of standard construction without charge. The referenced tariff language reads (in relevant part) as follows:

Where the Company extends its facilities on public highways or on private property in order to furnish telephone service in a territory where no facilities are available, the Company will provide each customer an allowance of one-half mile of standard construction without charge.

U S West Iowa Tariff No. 1, Section 4.5.A. Charges for construction in excess of the one-half mile allowance are based on the cost to the company to install the new facilities. U S West determined that it would have to place 6,081 feet of buried service wire in order to provide service to the Helms and the McCartys. After deducting the one-half mile allowance, U S West calculated there was 3,441 feet of cable to be placed, the cost of which was then divided between the two customers.

Board staff continued to ask questions of U S West concerning the calculation of the facilities extension charge. In particular, on February 26, 1999, staff asked U S West to explain why it was allowing only a single one-half mile allowance when two new customers were involved and the tariff says that "each" customer is entitled to a half-mile allowance. U S West responded on March 12, 1999, stating that the

half-mile allowance in the tariff does not mean that each additional customer gets an additional half mile. Instead, according to U S West, all customers located on a single extension are entitled collectively to the first half mile at no charge.

On March 19, 1999, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a letter in C-98-272 requesting issuance of a proposed resolution finding that each customer is entitled to a half-mile construction allowance, rather than a single allowance for multiple customers. U S West responded on April 6, 1999, arguing that the "tariff has never been interpreted to say that if the company places a mile of facilities for two customers that neither customer would pay excess construction."

On April 14, 1999, staff sent another letter to U S West stating that "Staff agrees with the Office of Consumer Advocate that it does not appear that EACH customer received one half mile credit..." (emphasis in original) and requesting additional information from U S West regarding the possibility of further cost sharing, in light of additional new construction in the area.

U S West responded on June 17, 1999, by re-stating its position and indicating that the Helms and the McCartys should be required to pay \$2,717 each for facilities construction in excess of one-half mile. U S West also indicated that it "appreciate[d] the additional information regarding the sale of neighboring property. U S WEST will investigate the facility requirements for the area. We are presently

working with our contractor to permanently replace the temporary facilities used to provide their service. Our contractor will be in contact with the customers."

On June 17, 1999, Board staff issued a proposed resolution, stating as follows: "It appears the company has agreed to allow you and the McCarts each the half-mile credit of construction charges. We believe this has saved each couple \$2,348.00." From this statement, it appears Board staff misunderstood U S West's response of June 17, 1999, and thought that U S West was giving the Helms and the McCarts a full mile of construction allowance, when in fact U S West had not changed its position on this issue.

On July 22, 1999, U S West filed its response indicating the Helms were being charged \$2,717.47 for the extension of facilities; two payments of \$226.47 had been made, leaving a balance of \$2,264.54 to be paid in ten installments. Staff communicated this information to the Helms on July 26, 1999.

B. C-99-386, McCart v. U S West

Tim and Vicki McCart filed an informal complaint with the Board on October 7, 1999, which was identified as C-99-386. The McCarts questioned the amount U S West was charging them for the facilities extension. They understood Board staff had ruled in favor of the customers in the Helms case, but they were being assessed a facilities extension charge of \$2,717, which meant they were sharing the half-mile allowance with the Helms. They believed the assessment was contrary to the proposed resolution.

U S West responded on November 3, 1999, once again asserting its position that the tariff gives the customers a single half-mile of construction credit, regardless of the number of customers involved. U S West submitted calculations showing that \$2,717 is the correct charge to each of the customers, based upon its interpretation of the tariff.

On November 17, 1999, Board staff issued a proposed resolution indicating that, based upon the resolution of the Helm complaint, Board staff could not intercede further in this matter.

C. Consumer Advocate Letter

On December 1, 1999, Consumer Advocate filed a letter in both complaint files, expressing concern that the final resolution of the Helms complaint did not, in fact, represent the decision made by Board staff. Consumer Advocate quotes from the Board staff letter of April 14, 1999, stating that "Staff agrees with the Office of Consumer Advocate that it does not appear that EACH customer received one half mile credit, in the case of the Helms and McCart's." Consumer Advocate concludes from this that Board staff intended to resolve the complaint in a manner favorable to the Helms and McCart's, but the final calculations of the amount due are based upon a resolution favorable to U S West. Consumer Advocate asks Board staff to reconsider the November 17, 1999, resolution in the McCart's' complaint file.

D. The Board Docketing Order

On December 19, 1999, the Board issued an order treating Consumer Advocate's letter as a request for formal complaint proceedings and combining the two informal complaint dockets for final resolution in Docket No. FCU-99-6. Because there are no disputed issues of material fact, the Board did not schedule a hearing in this matter. Instead, the parties were directed to file briefs and argument concerning the proper interpretation of the U S West tariff as applied to the facts of these cases.

Pursuant to the schedule set by the Board, the parties filed briefs on January 11, 2000. On the same date, Consumer Advocate filed a motion to file a supplemental brief, based on the fact that U S West had not yet responded to seven data requests sent by Consumer Advocate to U S West. The supplemental brief was filed on January 18, 2000.

E. The Briefs

1. Consumer Advocate

Consumer Advocate first argues that the tariff language is unambiguous and plainly states that "each customer" will receive an allowance of one-half route mile of standard construction without charge. If U S West, the drafter of the tariff language, did not intend to offer a construction allowance to each customer, then it should not have used the phrase "each customer" in the tariff.

Assuming for purposes of argument that the Board finds the tariff language is ambiguous, Consumer Advocate argues any ambiguity should be resolved against

U S West as the author of the tariff and that U S West's interpretation should be rejected because it renders the "each customer" phrase meaningless.

Finally, Consumer Advocate argues that the tariff provision giving a half-mile construction allowance represents a balancing of costs and anticipated revenue stream from future service. When multiple new customers request an extension in the same area, U S West's anticipated revenue stream is multiplied by the number of customers, so it only makes sense that the construction allowance should be multiplied to the same extent. Limiting a group of customers to a single half-mile construction allowance ignores the increased revenues and "produces a strained, impractical and absurd result which should be avoided."

2. U S West

U S West argues that the disputed tariff language means that U S West will absorb the cost of the first half-mile of an extension of service, after which the customer must pay the remainder. In these cases, U S West argues that it is being more generous than its tariff requires, because it could have required that the Helms (the first customers requesting service) pay the full cost for 3,441 feet of construction before service was installed; instead, the Company agreed to split the total construction cost between the Helms and the McCart. In fact, U S West argues it could still charge the entire excess cost to the Helms and nothing to the McCart, who would then be within one-half mile of the closest facilities (at the Helms' house).

U S West argues the tariff gives it a right to be paid up front for service extensions in excess of one-half mile. U S West argues that the customers' and Consumer Advocate arguments ignore the fact that both customers are being served from the same facility; if they were being served from two separate facilities, then each customer would be required to pay the cost of their own extension (in excess of their half-mile allowances). Once it is recognized that only a single extension is involved, then it becomes apparent that only a single construction allowance is appropriate; the extension tariff should never really apply to the McCartys, since the entire excess cost of the extension should be charged to the Helms. U S West's willingness to split the excess construction costs between the two customers should not be held against U S West.

3. Consumer Advocate Supplemental Brief

Consumer Advocate's supplemental brief is limited to an analysis of U S West's responses to seven data requests. Consumer Advocate asked U S West to describe the application of the extension tariff, using U S West's interpretation, in 14 hypothetical situations. Each situation was designed to test the application of the tariff to a different set of facts, all of which involve two or three new customers located at a specified distance from the nearest U S West facilities. Consumer Advocate argues that U S West's responses demonstrate that U S West's interpretation of the extension tariff language is impractical and absurd.

Consumer Advocate notes that, under U S West's interpretation of the tariff, the Company may actually collect **more** than the total cost of an extension, all the while claiming that it is giving the customers a half-mile credit. Consumer Advocate argues that this result is absurd, discriminatory, and possibly illegal. For example, in one situation, a total of 1.8 miles of construction is required, but U S West would charge the customers for 2.4 miles, while in another example, a customer would be required to pay an excess construction charge even though the customer is within 0.5 miles of the nearest facility.

Consumer Advocate argues that the results in many of these hypothetical situations demonstrate that U S West's interpretation of the disputed tariff language produces unreasonable and absurd results and should be rejected in favor of Consumer Advocate's interpretation, which produces a more fair, predictable, and reasonable outcome.

ANALYSIS

The Board finds that Consumer Advocate's interpretation of the disputed language is correct. The tariff language clearly provides that "each" customer is entitled to a one-half mile construction allowance. Black's Law Dictionary defines the word "each" as follows:

A distributive adjective pronoun, which denotes or refers to every one of the persons or things mentioned; every one of two or more persons or things, composing the whole, separately considered. The effect of this word,

used in the covenants of a bond, is to create a several obligation.

U S West's use of the word "each" in the tariff creates a separate obligation to each of the affected customers. Thus, under the clear and unambiguous terms of its tariff, in this case U S West owes one half-mile construction allowance to the Helms and another half-mile construction allowance to the McCartys.

U S West's responses to Consumer Advocate's data requests provide numerous examples of the unreasonableness of U S West's position. There is no basis in reason for U S West's claim that the tariff, which is intended to give the customers a construction **credit**, actually allows the Company to charge the customers for **more** than its true cost of construction under certain circumstances. U S West's proposed interpretation of the disputed tariff language must be, and is, rejected, and U S West will be ordered to refund to the Helms and the McCartys any amounts U S West has collected in excess of an amount calculated under the correct interpretation of the tariff, as provided in this order.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Section 4.5.A of U S West's Iowa Tariff No. 1 should be, and is, interpreted to provide that when U S West extends facilities on public highways or on private property in order to furnish telephone service in a territory where facilities are not already available, U S West must provide **each** customer an allowance of one-

half mile of standard construction without charge. U S West is prohibited from applying the referenced tariff section in such a manner as to allow only a single half-mile allowance for multiple customers.

2. Any charges U S West has collected from the Helms or the McCartys for extension of facilities in excess of the amounts permissible under Section 4.5.A of U S West's Iowa Tariff No. 1, as interpreted in Ordering Clause No. 1, above, are illegal and improper and should be refunded within 15 days of the date of this order.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper
Executive Secretary, Deputy

/s/ Diane Munns

Dated at Des Moines, Iowa, this 24th day of February, 2000.